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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MIRTHA URBANO,
Petitioner

v.

CONTINENTAL AIRLINES, INC.,
Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

I. INTRODUCTION.

Where do we begin? Respondent Continental's Brief contains so many irrelevant and misleading assertions of the underlying facts, the applicable case law, and Petitioner's arguments, that it is difficult to ascertain how best to refocus this Court on the appropriate considerations regarding whether to grant a writ of certiorari. The following represents our best attempt at clarification.

II. CONTINENTAL'S NEWLY FASHIONED LABEL – "WORKERS COMPENSATION PROGRAM" – ACTUALLY PROVES TOO MUCH.

A. Little "w," little "c," little "p"

Perhaps the best place to start is with Continental's innovative (and repeated) description of its light-duty policy as a "workers compensation program"[1] or "workers compensation policy."[2] That terminology can be used only in a generic sense, insofar as *the record does not indicate that any officially titled "Workers' Compensation Program" ever existed at Continental.* Indeed, this Court might notice that the words "workers' compensation" are not mentioned anywhere within the challenged opinions of the Fifth Circuit and district court. That is most likely because Continental *never used* the terms "workers' compensation program" or "workers' compensation policy" at any stage of this litigation before now – i.e., *not* in any pleadings to the district court, *not* in its summary judgment motion, *not* in any briefs to the Fifth Circuit, and *not* in the oral arguments to the Fifth Circuit.

Presumably, Continental now invokes that quasi-official-sounding label to suggest a formal link between its light-duty policy and the workers' compensation laws. Yet, in truth, such a program is not in any way contemplated or required by the workers'

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[1] *See* Resp. Brf. at 15, 16, 17.

[2] *See* Resp. Brf. at *i*, 1, 2.

compensation statutes of the State of Texas.[3] Thus, to the extent that Continental's particular policy of providing light duty was created solely by and for the company's own use, the policy is not due the same deference as legislative enactments.

Accordingly, Continental's reliance on the case of *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979), is misplaced. *Cf.* Resp. Brf. at 15-17 (asserting that the decisions of the Fifth Circuit and the district court below should be sustained because they are allegedly consistent with *Feeney*). In *Feeney*, this Court reviewed a policy created by the Massachusetts legislature whereby military veterans were given a hiring preference over other employment applicants. This Court upheld that policy as not constituting unlawful sex discrimination, largely on the recognition of a state government's general prerogative to create job classifications that "bear a close and substantial relationship to important governmental objectives." *Feeney*, 442 U.S. at 273. Obviously Continental, as a private employer, is not in a position to decide what the government's objectives are; indeed, Continental makes no claims that its light duty policy is reflective of any general public policy. The light duty policy must, therefore, stand or fall based on typical Title VII analysis.

B. Capital "L," capital "D": The Limited Duty program in operation

According to the portion of Continental's policy and procedures manual reproduced for the district court as a summary judgment exhibit, the official description of the program being challenged was one of "Limited Duty." As indicated in the Petition and in the lower courts' opinions, the Limited Duty program was also referred to as a "transitional duty" or "light duty" policy. The term "light duty" will continue to be used here insofar as it has been the term most commonly used since this litigation began back in 1995.

In substance and practice, however, Continental's light duty policy can also be very accurately described as an *anti*-workers' compensation program, insofar as a major effect – and apparently a major intent – was to reduce the monetary benefits paid to recuperating workers. In other words, it appears that the policy's

[3] *See* TEX. LAB. CODE §§ 401.001-418.002 (Texas Workers' Compensation Act).

primary benefit to Continental has been to keep workers with job-related injuries on the jobsite, such that the payments coming specifically out of workers' compensation funds would be decreased.

With that understanding, suspicions must arise as to Continental's claim that it is merely providing a unique reward for the "sacrifice" of employees injured on the job and, for those employees only, a method that "eases their transition . . . to normal, unrestricted duty." *See* Resp. Brf. at 16. Of course, if there were a *true* recognition of "sacrifice," the benefits paid to the worker might bear some proportionate relationship to the amount of pain and suffering endured from a particular injury. However, as Continental is acknowledging by its newfound label for the program, the benefits Continental actually pays to such workers are no more and no less than is required by the workers' compensation laws. Moreover, if the purported need to "ease their transition" were a *true* concern, more consideration might be given to allowing an injured employee to recuperate without having to worry about working through the injury. On the other hand, to the extent that an employee's subjective feelings through the "transition" *is* a legitimate concern, there is no conceivable, *non-cost-based* reason why a pregnant employee like Ms. Urbano (or any other worker who did not suffer an on-the-job injury) would not have a similar interest in such benefits – or a similar desire for a continuing paycheck. This Court can simply refer to the Petition for a discussion of why a cost-based rationale contravenes the Pregnancy Discrimination Act, given the holding in *International Union v. Johnson Controls*, 499 U.S. 187 (1991). *See* Petition at 13-15.

C. A ruse is a ruse is a ruse

Even if Continental had called its light duty policy a "workers compensation program" from the outset, that policy – as implemented – would be no less discriminatory, and no less violative of the PDA's mandate that any comparison be limited to employees' "ability or inability to work." *See* 42 U.S.C. § 2000e(k). No matter how official-sounding Continental now wishes to re-designate its flawed program, the fact remains that such a policy was voluntarily implemented with either intentional or reckless disregard for its effect on pregnant employees such as Ms.

Urbano. The plain language of the PDA demands a rejection of that policy as applied to Ms. Urbano.[4]

This is probably an appropriate time to explain the significance of Ms. Urbano's co-worker, Peggy Johnson, given that Ms. Johnson's situation provides added evidence of the pretexts underlying the light duty policy; Continental's explanation of the situation is confused. *Cf.* Resp. Brf. at 2 n.3. Specifically, Continental references evidence consisting of a list of forty-eight employees (including Peggy Johnson) who received light duty *in 1994*, and then triumphantly (albeit bewilderingly) notes that Peggy Johnson suffered a job-related injury and received light duty in September of *1995*. *Id.* That discussion completely misses the point. Ms. Urbano's contention does relate to the provision of light duty to Peggy Johnson *in 1994*, but traces it to its more logical connection: evidence that Ms. Johnson suffered an injury *in 1994* for which no job-related cause was established. Such evidence of the policy's arbitrary use should have defeated summary judgment.

As that same list of forty-eight workers who received light duty (including ones with medical lifting restrictions like Ms. Urbano's) provides statistical evidence of a disparate impact, there is another number that is even more significant: Zero. That is how many pregnant women could ever take advantage of the light duty policy based on their pregnancy, given that *pregnancy is simply excluded from the equation*. Ms. Urbano would submit that that might be the *ultimate* statistic in a disparate impact claim under Title VII.[5]

III. WHAT WE REALLY WANT.

Whether resulting from a simple misunderstanding, or overzealous advocacy, many of the assertions in Continental's Brief mischaracterize Ms. Urbano's arguments as they relate to the facts, the challenged opinions, and the cited case law. Petitioner reasserts that the contentions within the Petition are very straightforward, and

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[4] Insofar as Continental asserts that putting pregnant women in the top category of benefits would impermissibly discriminate against workers with off-the-job injuries or illnesses, it is worth noting that one option for this Court may be to declare the program invalid as a whole, not just as it applies to pregnant women.

[5] *Contra* Resp. Brf. at 5-6 (stating there was "no statistical evidence"); Petition App'x at 12a-13a (district court unclearly explaining whatever test it used).

no more complicated than any fair reading would suggest. Yet, in many instances, it appears that Continental "just doesn't get it."

A. Ms. Urbano's actual arguments

The primary argument under the PDA by Ms. Urbano is simply that this Court should look at the correct comparison: whether beneficiaries of the light duty policy were "similarly situated" with her (as a pregnant woman) based on the test used under the PDA – *the "ability or inability to work."* *Accord* Petition at 8-12. The repetitive assertions by Continental that pregnant women are denied benefits to the same extent as employees with off-the-job injuries or illnesses is completely irrelevant. *Cf.* Resp. Brf. at *i*, 3, 7, 12, 15. It is on the *actual* question presented of what it means to be "similarly situated" that the Fifth and Sixth Circuits are now split, as demonstrated very emphatically by the language of the opinion below, wherein Judge Edith Jones declared that "the Sixth Circuit effectuates discrimination contrary to the PDA." Petition App'x at 6a (138 F.3d at 207).

Another mischaracterization of Ms. Urbano's position is the assertion that she is asking this Court to reject two prongs of the *McDonnell Douglas* test. *See* Resp. Brf. at 10. That is completely inaccurate. The *McDonnell Douglas* test has been the law for a quarter of a century, and Ms. Urbano is not attempting to change it now. The concern raised before this Court is that the courts below misapplied the facts *in relation to* the *McDonnell Douglas* test. Indeed, the second and fourth prongs – how Ms. Urbano demonstrated that she is qualified for the benefits denied and "similarly situated" with the actual beneficiaries – are the focus of the first two questions presented by the Petition. *See* Petition at i, 8-12. As for another of Continental's accusations – that Ms. Urbano seeks to avoid a showing of pretext – the Petition contains detailed discussions of the evidence in the record that would suggest pretext, but which the lower courts simply ignored. *Compare* Resp. Brf. at 11 *with* Petition at 4, 5, 6, 14-15, 16-17.

Finally, it is worth noting that the underlying challenge stems from a summary judgment ruling that "no genuine issue as to any material fact" existed. *Cf.* FED. R. CIV. P. 56(c). Accordingly, Ms. Urbano does not seek "another bite at the apple of evidentiary

review" – because it is her position that the district court and the Fifth Circuit were not supposed to weigh the evidence and make "findings" in the first place. *See* Resp. Brf. at 18; *see also generally Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . ."). To the extent that the lower courts took a result-oriented approach and made credibility determinations, or simply ignored the evidence indicating the existence of genuine and material fact issues, the lower courts' rulings should be reversed.

B. Other irrelevancies raised by Continental

Whether characterized as red herrings or fish tales, Continental's Brief in Opposition muddies the waters of this appeal by mentioning countless irrelevant issues.[6] Ms. Urbano prays that this Court resists the temptation to nibble at the bait.

One irrelevancy repeatedly mentioned by Continental is the fact that the mid-level manager (Kimberly Joseph) who signed Ms. Urbano's termination letter was pregnant at the time. Resp. Brf. at *i*, 4 n.4, 6, 18. Ms. Urbano has never asserted that Continental fired pregnant women with desk jobs who might not need work accommodations. The central complaint is that the company-wide policy discriminated against pregnant women who *did* need accommodations like those granted to others with job-related injuries or illnesses. Moreover, the evidence before the lower courts included deposition testimony from Ms. Joseph indicating she was not the sole "decisionmaker," but part of a process involving other supervisors and managers. *Cf.* Resp. Brf. at 4 n.4, 18.

Another superfluous contention is that Ms. Urbano should simply accept Continental's discriminatory policy and go back to work for them. *See* Resp. Brf. at 5. That is completely unrealistic

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[6] The problem is not helped by Continental's illusion of precision, by using citations to a record that its counsel is aware is not yet before this Court. Moreover, Continental's charge that the Petition misstates and omits "crucial facts" is, at best, inconsistent with Continental's initial decision to waive the right to file a response or challenge Ms. Urbano's representation of *any* facts – especially in light of the duty imposed by this Court's rules obligating counsel to clarify the facts for this Court. *Compare* Resp. Brf. at 5 *with* S. Ct. R. 15.2.

and counter-intuitive, in a situation where (1) Ms. Urbano was already the target of one retaliatory firing and (2) she had the ability to get pregnant again – only to be subjected to the same hardships and denial of benefits. The comment that Ms. Urbano "remains a full-time homemaker" (who could presumably go back to Continental) is just plain wrong. *Id.* After a lengthy job search, Ms. Urbano found employment elsewhere in the travel industry, where she has remained for approximately the last two years.

There is no merit to the added suggestion that Ms. Urbano is somehow at fault for not calling Continental after being terminated; Continental says that she should have recognized the "obvious error." *Id.* at 4. However, in light of the complete denial of light-duty benefits, immediate and forced use of leave time, and denial of health benefits, a firing one day after Continental received Ms. Urbano's EEOC charge was fully consistent with her understanding of Continental's uncaring treatment of pregnant employees.

Along those same lines is another of Continental's contentions regarding the termination, which is particularly interesting. That is, Continental now asserts that "contrary to" the statement in the Petition that Continental "lost" all evidence of the basis for the termination letter, Continental simply "no longer had the lists." Resp. Brf. at 4 n.4. Although this may be a distinction without a difference, Ms. Urbano simply gave Continental the benefit of the doubt that the missing information was "lost," because the only other alternatives are more pernicious: that Continental destroyed the information, intentionally concealed the information, or simply fabricated its existence to begin with. Although this Court can make whatever assumption it wants, the undisputed fact is that the missing documents were not available as evidence to support Continental's key contention of an "inadvertent" firing.

IV. "THE WHOLE WORLD IS WATCHING": THIS CASE IS INDEED WORTHY OF CERTIORARI REVIEW.

In several instances within the Brief in Opposition, Continental asserts that the issues raised by the Petitioner are "unworthy of," "not deserving of," or "not appropriate" for review by this Court. *See* Resp. Brf. at 8, 10, 15, 17, 18, 19. Such a condescending view of this case is unwarranted in light of what is at stake.

As reflected by the Petition, jurisdiction of Ms. Urbano's appeal to this Court is predicated on several well-established precepts of certiorari review: conflict with the language of a federal statute, conflict with prior decisions of this Court, and conflict with the decisions of other Circuits. *See* Petition at 11, 13, 15, 17, 19, 20; *accord* S. CT. R. 10(a, c). This is not simply a theoretical exercise, or an issue of "semantics." *Cf.* Resp. Brf. at 8, 17. There are wide-ranging, real-world consequences to this Court's ultimate decision in this case.

For instance, as reflected by Ms. Urbano's fourth Question Presented, the split in the circuits regarding *Hicks* is real, and has generated extensive academic commentary. *See* Petition at i, 17-18; *see also, e.g.*, *Developments in the Law – Employment Discrimination*, 109 HARV. L. REV. 1568, 1597-1602 (1996); Thomas Duley, *Summary Judgment and Title VII after* Hicks*: How Much Evidence Does it Take to Make an Inference?*, 28 U.C. DAVIS L. REV. 261 (1994); Jody H. Odell, *Between Pretext Only and Pretext Plus: Understanding* St. Mary's Honor Center v. Hicks *and its Application to Summary Judgment*, 69 NOTRE DAME L. REV. 1251 (1994).

Moreover, as reflected by Ms. Urbano's fifth Question Presented, the nationwide split in the circuits regarding retaliation claims and "suspicious timing" is real as well. *See* Petition at i, 19 (citing a sampling of almost a dozen conflicting cases from nine different federal circuit courts). Many courts have acknowledged the necessity of indirect evidence of intent in Title VII cases, such as "suspicious timing," because the underlying accusation is inherently difficult to resolve. *E.g.*, *United States Postal Serv. Bd. Of Governors v. Aikens*, 460 U.S. 711, 716 (1983) ("There will seldom be 'eyewitness' testimony as to the employer's mental processes."). Chief Judge Posner of the Seventh Circuit has articulated the reality of the situation very well:

> [S]uspicious timing . . . [is among] the most common type of evidence in an intentional discrimination case, now that employers have taught their supervisory employees not to put discriminatory beliefs or attitudes into words oral or written.

Troupe v. May Dep't Stores Co., 20 F.3d 734, 736 (7th Cir. 1994) (further noting that such evidence can be "sufficient by itself . . . to support a judgment for the plaintiff").

Contrary to Continental's implication, the lower courts' rulings do indeed reflect a rejection by the Fifth Circuit of the importance of "suspicious timing." *Cf.* Resp. Brf. at 17-18 (asserting that Petitioner's counsel "comes perilously close to failing to be candid with this Court"). The district court's doublespeak of declaring that "timing . . . may be a significant, but not necessarily determinative, factor," was clarified by the court's ultimate conclusion that Ms. Urbano's presentment of "no evidence, *other than* the close timing" rendered her showing to be "insufficient" to preclude summary judgment. Petition App'x at 14a-15a (emphasis added); *see also id.* at 16a (reflecting same conclusion on FMLA retaliation issue). As a practical matter, such a declaration that timing as brief as a *one-day* turnaround is "significant" has no meaning if it is still regarded as legally "insufficient" to allow the case to proceed to a jury.

Current and future litigants, along with the federal judiciary, would greatly benefit from the guidance provided by a concise rule on "suspicious timing" articulated by this Court. Of course, Ms. Urbano herself seeks to be the initial beneficiary.[7]

As a further testament to the "worthiness" of this matter, the potential impact of the lower courts' rulings also spurred the participation of several amici curiae at the Fifth Circuit level[8]; it is reasonable to assume that many of the same amici would seek to provide additional briefing assistance if this Court decides to grant certiorari. The compelling nature of this case has even attracted national media attention to Ms. Urbano, causing her and her family to be the subject of a featured segment on a national news telecast

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[7] Contrary to Continental's assertion, Ms. Urbano has not waived, her claims under the FMLA. *See* Resp. Brf. at 1 n.2. In fact, her retaliation claim encompasses both the PDA *and* the FMLA, insofar as both were raised in the same EEOC filing. *Accord*, 29 U.S.C. § 2615(a, b) (prohibiting retaliation under the FMLA).

[8] The amici curiae included (1) the Women's Legal Defense Fund, (2) the American Civil Liberties Union Foundation Women's Rights Project, (3) the National Women's Law Center, (4) the NOW Legal Defense and Education Fund, and (5) the Women's Law Project.

as this case was pending in the Fifth Circuit. *NBC Nightly News with Tom Brokaw: "The Sex War – Pregnancy"* (NBC television broadcast, Oct. 24, 1997, story reported by Andrea Mitchell).

The additional irreconcilable conflicts raised in the Petition are more than just "semantics," as Continental attempts to downplay them.[9] *See* Petition at 8-11 (discussing conflict with plain language of the PDA), 11-13 (discussing conflict with *Ensley-Gaines*), 13-15 (discussing conflict with *Johnson Controls*). Ms. Urbano reiterates the significant nature of this case not only for herself, but for victims of workplace discrimination across the United States.

V. "JUST WALK BESIDE ME"[10]: A CONCLUSION.

While fervently asserting that Continental's light-duty policy impermissibly relegates her to a status behind other temporarily disabled workers, Ms. Urbano does not view, nor seek, preferential treatment as the only alternative. All Ms. Urbano asks of this Court is to apply the plain language that is *already* in the PDA and Title VII, and acknowledge her equal right to benefits that Continental was *already* providing to other workers. Ms. Urbano also believes that she was entitled to assert that right without being the subject of a retaliatory firing. Without annoying this Court further on the issue of which counsel's characterizations are more faithful to the actual record, Ms. Urbano simply asks this Court to review the factual assertions objectively, review the cited cases, and review the plain language of the controlling statutes. We are confident that, after such review, this Court will recognize the significance of the claims made by Ms. Urbano and the irreconcilable conflicts between the judgments below with over a dozen cases from other Circuits and this Court. Ms. Urbano hereby again requests that this Court grant her request for a Writ of Certiorari.

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[9] It is interesting that Continental cites the key Sixth Circuit case of *Ensley-Gaines v. Runyon*, 100 F.3d 1220 (6th Cir. 1996) only once in a footnote, despite the fact that the Fifth Circuit opinion being challenged devotes four paragraphs to criticizing it as a basis for its ruling. *Compare* Resp. Brf at 7 n.9 *with* Petition App'x at 5a-7a (138 F.3d at 207-08). Continental even concedes the irreconcilable, inter-circuit conflict in the same footnote, if only to say that the basis for certiorari review would be "to overturn [that] poorly-reasoned opinion."

[10] The reference is from a short poem by Albert Camus, entitled "Friends."

Respectfully submitted,

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